INDEX.

	Page
Statement	1
Opinion of the Court Below	3
Reasons for Denying Writ	5
Argument	6
Conclusion	9

AUTHORITIES.

Cases.

Baltimore and Ohio Ry. v. Kepner, 314 U. S. 44	7, 8
Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R. I. & P. Ry. Co., 294 U. S. 648	8
Crosley Corp. v. Hazeltine Corp., 122 F. (2d) 925 (C. C. A. 3, 1941)	7
Gulf Oil Corp. v. Gilbert, 330 U. S. 501	6, 7, 8
Hoffman v. Foraker, 274 U. S. 21	7
Koster v. Lumbermen's Mutual Casualty Company, 330 U. S. 518	6
Rogers v. Guaranty Trust Company, 288 U. S. 123	7
Steelman v. All Continent Corporation, 301 U. S. 278	5, 8
United States v. National City Lines Inc., et al., 7 F. R. D. 393	5, 8

Statutes.

Clayton Act, Section 12, 15 U. S. C. A. 22	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 729.

INTERSTATE CIRCUIT, INC., a Corporation, TEXAS CONSOLIDATED THEATRES, INC., a Corporation, PARAMOUNT FILM DISTRIBUTING CORPORATION, a Corporation, LOEW'S INCORPORATED, a Corporation, RKO RADIO PICTURES, INC., a Corporation, WARNER BROTHERS PICTURES DISTRIBUTING CORPORATION, a Corporation, COLUMBIA PICTURES CORPORATION, a Corporation, UNITED ARTISTS CORPORATION, a Corporation, and UNIVERSAL FILM EXCHANGES, INC., a Corporation,

Petitioners,

v.

TIVOLI REALTY, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

On November 6, 1947, Tivoli Realty, Inc., a Texas Corporation which owns and operates a motion picture theatre in Dallas, Texas, filed in the United States District Court for the District of Delaware an action under the Federal Antitrust laws against fourteen corporate defendants. (R. 15-41). Twelve of the fourteen defendants are the major

producers and distributors of motion pictures in the United States. Two are theatre chains operating in the State of Texas and environs. (R. 16-21).

Tivoli filed suit in Delaware for the reason that jurisdiction and venue pursuant to Section 12 of the Clayton Act (15 U. S. C. A. 22) could be obtained in that district with respect to at least thirteen of the fourteen defendants. Venue with respect to only one, Paramount Pictures, Inc., was considered doubtful (R. 62). There is no other district in which venue over this entire group of defendants could be secured (R. 66).

Of the fourteen defendants, ten are incorporated in the State of Delaware. These ten are:

Paramount Film Distributing Corporation
Loew's Incorporated
Radio-Keith-Orpheum Corporation
RKO Radio Pictures, Inc.
Warner Bros. Pictures, Inc.
United Artists Corporation
Universal Pictures Company, Inc.
Universal Film Exchanges, Inc.
Interstate Circuit, Inc.
Texas Consolidated Theatres, Inc.

(R. 66-7)

Three of the remaining four defendants are New York corporations, but they directly license and distribute pictures in Delaware. These three are:

Twentieth-Century Fox Film Corporation
Warner Bros. Pictures Distributing Corporation
Columbia Pictures Corporation

(R. 67)

Suit was not instituted in Texas for the reason that venue with respect to six of the defendants was considered improper or dubious (R. 66). Five of these six defendants denied that they are subject to the venue of the courts in Texas, in a statement filed in the District Court below (R.

59). These five are principals in the conspiracy which plaintiff alleges in its Delaware action (R. 68-69). They did not join or intervene in petitioner's suit below and are not parties to this petition.

Petitioners filed this suit on December 8, 1947, in the United States District Court for the Northern District of Texas seeking an injunction on the ground of *forum non conveniens* against Tivoli Realty, Inc., from proceeding with its Delaware action (R. 1).

The trial court, after a hearing on an order to show cause why preliminary injunction should not issue, granted a temporary injunction preventing Tivoli from further prosecution of its Delaware action (R. 74, 79).

An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit. That Court reversed the trial court and ordered the injunction dissolved (R. 93, 99). Petitioners moved the Circuit Court of Appeals for a stay of the issuance of mandate. This motion was denied by an order filed April 5, 1948. Thereafter petitioners made applications to this Court for orders staying the mandate of the Circuit Court of Appeals. These were denied by Mr. Justice Black and the Chief Justice on April 6 and April 8, 1948, respectively.

Opinion of the Court Below.

The Circuit Court of Appeals based its decision on various alternative grounds, none of which warrants review by the Supreme Court of the United States.

1. The record revealed to the Court certain facts which of themselves rendered the doctrine of *forum non conveniens* inapplicable.

(a) The plaintiff, Tivoli, in bringing its Delaware action did not have a choice of forums between Texas and Delaware. Only in Delaware could Tivoli have secured venue with respect to the defendants necessary to its cause of action. There being only one appropriate forum, the doctrine of *forum non conveniens,* could not apply. Relying upon

statements by this Court hereinafter cited, the court below said,

> "At least two such forums must be open to the plaintiff before the doctrine comes into play; and they shall not be dependent merely upon the will or grace of the defendant, but must be provided by law." (Opinion of the Court, R. 95)

(b) Tivoli's Delaware action alleges a nationwide conspiracy in the distribution of motion pictures (R. 15-41). The principal actors in the alleged conspiracy, who are necessary witnesses, are located in New York City, New York, closer to Delaware than Texas by many hundreds of miles (R. 62-64). The court, in view of this fact, ruled that Delaware presented a more convenient forum.

(c) The plaintiff in the Delaware action did not search out a forum which would be harassing and vexatious, but brought its suit in the state of incorporation—the legal domicile of the major defendants—which was the only district in which venue could be secured with respect to the participants in the conspiracy.

2. The second main ground for the Circuit Court's opinion was a recognized principle of comity, namely that

> "United States district courts are not inclined to interfere by injunction with suits in other federal districts where the inequity alleged is based solely on inconvenience (citing Baltimore and Ohio R. Co. v. Kepner, 314 U. S. 44, 53)". (Opinion of the Court, R. 95)

3. The court also held that the venue statute, Section 12 of the Clayton Act (15 U. S. C. A. 22), under which Tivoli brought its Delaware action, precluded application of the doctrine of *forum non conveniens* (Opinion of the Court, R. 97-99).

Reasons for Denying the Petition for Writ of Certiorari.

Respondent contends that the Petition for Writ of Certiorari should be denied for the following reasons:

1. The decision below is based upon alternative grounds, all of which are sound, and any one of which would require affirmance by this Court.

2. The decision below presents no conflict with any decision of this Court or with any other Circuit. The case of *Steelman* v. *All Continent Corporation,* 301 U. S. 278, cited by petitioners is, as we shall discuss, completely irrelevant.

3. The decision below does not present for determination any important question of federal law, because certain of the alternative grounds upon which it is based depend upon the peculiar facts of the case. Others—such as the absence of alternative forums and the principle of comity—rest upon recent pronouncements by this Court.

4. One of the bases of the decision below is purely factual, presenting no question of law for the decision of this Court.

5. Although it is true that this Court has never ruled on the question of whether or not the special venue provision of the Clayton Act prevents the application of the doctrine of *forum non conveniens,* the holding of the Circuit Court of Appeals on this subject was not the only basis for decision. This Court now has before it a case in which this question will be settled, *United States* v. *National City Lines,* No. 544, argued during the week of April 26, 1948. Presumably, the *National City Lines* case will have been decided before this case could be decided.

ARGUMENT.

I. The Action of the Circuit Court of Appeals in Dissolving the Temporary Injunction Issued Below on the Facts Was Proper.

1. The holding of the Circuit Court of Appeals that the doctrine of *forum non conveniens* may not apply unless a plaintiff has a choice of at least two forums in which he may properly institute suit is in strict conformity with the latest holdings of the United States Supreme Court on this subject.

Mr. Justice Jackson said in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 at 506-7:

> "In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

The record establishes the fact that Tivoli did not have such a choice. There was no forum except Delaware in which it could properly file suit. The statement filed in the district court by five of the principal defendants in Tivoli's Delaware action admits this to be a fact (R. 59). It is submitted that the decision of the Court below would have conflicted with the *Gulf* case only if it had ruled in favor of petitioners rather than for respondent regardless of the other factors involved.

2. The Court below also held,

> "We agree with Tivoli that the trial in Texas would be more costly than in either Delaware or New York, because the alleged conspiracy is nationwide and the necessary witnesses, in the main, would have to be brought to Texas from New York, which is much closer to Delaware than is Texas." (R. 97)

This statement receives overwhelming support from the record (R. 62-64).

When trial is less costly and more convenient in the forum in which a plaintiff institutes suit, *forum non conveniens* may not apply to defeat jurisdiction. This is the rule as established by this Court. *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501; *Koster* v. *Lumbermen's Mutual Casualty Company,* 330 U. S. 518; *Rogers* v. *Guaranty Trust Company,* 288 U. S. 123.

3. The court below further held that the institution by Tivoli of suit, not in some arbitrarily selected forum, but at the very domicile of ten of the fourteen defendants, did not justify application of the doctrine of *forum non conveniens.* This holding is in accord with *Crosley Corp.* v. *Hazeltine Corp.,* 122 F. (2d) 925 (C. C. A. 3, 1941). See also *Hoffman* v. *Foraker,* 274 U. S. 21.

II. The Doctrine of Comity Supporting the Holding of the Circuit Court of Appeals is in Accordance With Decisions of the United States Supreme Court.

Petitioners state that the Circuit Court of Appeals erred in holding that one United States district court should not as a matter of comity restrain a plaintiff on grounds of *forum non conveniens* from proceeding with an action in which jurisdiction has previously been properly acquired in another United States district court.

Petitioner's argument appears to be based upon a misunderstanding of the doctrine of comity. Comity does not raise the question of the power of the district court. The question is whether this power may be exercised.

In both *Baltimore and Ohio Ry.* v. *Kepner,* 314 U. S. 44, and *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, this Court has said that one United States district court should not exercise its equity powers to restrain prosecution in another United States district court on the ground of convenience. As Mr. Justice Jackson stated in the *Gulf Oil* case, at 508, the doctrine of *forum non conveniens* is left to the

> "* * * discretion of the court *to which plaintiff resorts* * * *" (Italics added).

In the *Kepner* case, this Court said, at 53,

> "But the federal courts have felt they could not interfere with suits in far federal districts where the inequity alleged was based only on inconvenience."

The *Steelman* case in no way conflicts with these holdings. In that case the question was whether the United States District Court for the District of New Jersey acted properly in protecting *its previously acquired* jurisdiction in a bankruptcy proceeding by enjoining a party from proceeding with subsequent litigation in another district court concerning the bankrupt estate. Mr. Justice Cardozo, citing *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, stated that the Court's equity powers are properly exercised

> "to issue an injunction when necessary to prevent the defeat or impairment of *its* jurisdiction . . . " (at 289) (Italics added).

This holding in no way conflicts with the case at bar. Jurisdiction over the present cause had been first obtained by the Delaware court—not by the Texas court. And this Court's opinion in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, makes it very clear that the proper tribunal in which to apply for relief on the ground of *forum non conveniens* is the Delaware court.

It is unnecessary to elaborate the obvious point: That unless the administration of *forum non conveniens* is confined to the courts in which the original proceedings are filed, great confusion and conflict will inevitably result.

III. The Court Below Properly Held That Forum Non Conveniens is Not Applicable to Proceedings Under Section 12 of the Clayton Act. That Issue is Before This Court in Another Proceeding.

This issue is before this Court in *United States* v. *National City Lines*, No. 544, which was argued in the week of April 26.

We submit, however, that the holding below is clearly proper. In enacting Section 12 of the Clayton Act, Congress deliberately enlarged and specified venue for antitrust actions. This was done to facilitate the execution of the vital national policy reflected in the antitrust laws. The courts should not infringe upon the Congressional prescription, nor impair the application of the antitrust laws, by subjecting suits brought under them to the hazards and delays of *forum non conveniens*.

CONCLUSION.

We respectfully urge, for the reasons stated, that the petition for certiorari be denied.

Respectfully submitted,

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